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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 WAITHIRA NJENGA,

No. C-08-04019 EDL

12 Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

13 v.

14 SAN MATEO COUNTY
SUPERINTENDENT OF SCHOOLS, et al.,

15 Defendants.
16 _____/

17 In this employment discrimination case, Plaintiff Waithira Njenga alleges that she was
18 subjected to a hostile work environment, discrimination and retaliation based on her race, gender,
19 color and national origin. Plaintiff was employed as a vocational education specialist in the
20 Secondary Services Division of the San Mateo County Office of Education from 1993 until 2007.

21 On November 10, 2009, Defendants moved for summary judgment. The Court subsequently
22 granted Plaintiff's request for an extension of the briefing schedule, and held a hearing on
23 Defendants' motion on February 23, 2010. The parties submitted supplemental briefs on various
24 issues on March 8, March 9, March 16 and March 17, 2010. For the reasons stated at the hearing
25 and in this Order, Defendants' Motion for Summary Judgment is granted in part and denied in part.
26

27 **Facts**

28 Plaintiff is of African descent and Kenyan national origin. See id. ¶ 2. She came to the
United States for her education sometime before 1980. See id. ¶¶ 4-5. From 1993 through 2007,

1 she usually traveled to Kenya at least once per year. See id. ¶ 3.

2 Plaintiff began her employment with the San Mateo County Office of Education (SMCOE)
3 on February 3, 1993 as a Vocational Education Specialist assigned to the WorkAbility program in
4 the Secondary Services Division. See Njenga Decl. ¶ 7. Her duties in this position were, among
5 other things, to act as a liaison between Special Education day class teachers and the Vocational
6 Education Training Program, to develop and provide in-service training, and to provide on-site
7 assessments for Special Education students. See id. ¶ 10. She received positive performance
8 evaluations. See id. ¶ 12.

9 Plaintiff stated that throughout her employment, she was excluded from unit meetings at
10 which decisions about work assignments were made by group consensus. See id. ¶ 34, 39. Even if
11 she was not excluded, when she would walk into a meeting, all conversation would stop and the
12 room would become silent. See id. ¶ 35. Plaintiff was ignored and disrespected. See id. Plaintiff
13 stated that group decisions were routinely made over her objections and resulted in her being
14 assigned to schools in the extreme ends of the County and with the most severely disabled students.
15 See id. ¶¶ 40-43.

16 Defendant Pex stated that she has never excluded Plaintiff from any staff meeting, and that
17 meeting dates were published and known to all in advance of the meeting dates. See Pex Decl. ¶
18 6(d). Pex also stated that she would periodically conduct meetings with individual counselors and
19 other employees to which Plaintiff would not be invited if the meeting did not pertain to Plaintiff.
20 See id. Further, Pex stated that to the extent that Plaintiff accused Pex of giving Plaintiff the least
21 desirable assignments, Pex, as the supervisor, was not involved in assigning teaching aides and site
22 locations, which were determined by consensus among the vocational counselors, or assigning
23 teaching hours, which were determined by each Vocational Education Specialist. See Pex Decl. ¶
24 6(e), ¶ 6(f).

25 Plaintiff stated that in 1997, a white male Special Education teacher referred to a student
26 using the “N” word in Plaintiff’s and the student’s presence. See id. ¶ 21. Plaintiff also heard this
27 teacher refer to his teaching assistant as a bitch and “white trash.” See id. ¶ 23. Plaintiff stated that
28 this teacher also asked her for a date and said that he was sexually attracted to her. See id. ¶ 24. She

1 complained to her white male supervisor, John Piper, but he ignored her. See id. ¶ 25. On February
2 23, 1998, Dr. Cecil Reeves, the Personnel Director at SMCOE until 2003, sent a memo to Plaintiff
3 stating that he had completed an investigation of this incident, but was unable to find a corroborating
4 witness. See id. ¶ 29.

5 In early 2000, Plaintiff's supervisor, John Piper, asked her about henna designs she had on
6 her body after returning from Kenya, and how the body art would "affect things." See id. ¶ 14.
7 Shortly thereafter, a white colleague, Marsha Castell-Blanch, asked if the tribal body art was black
8 magic. See id. ¶ 15. Other co-workers over the years have also asked about Plaintiff's body art that
9 she obtained in Kenya. See id. ¶ 16. Plaintiff has also brought back tribal artifacts from her travels
10 to Kenya, which she would display in her work area, and about which co-workers would comment
11 negatively. See id. ¶ 18.

12 During the fall of 2000, Plaintiff informed John Piper that she was having trouble with Elaine
13 Hawley, a white female support staff member whom Plaintiff believed was causing a hostile work
14 environment. See id. ¶ 30. Piper suggested a mediator, but Plaintiff thought that mediation would
15 be futile and did not participate. See id. ¶ 32.

16 Plaintiff stated that from 2001 through 2005, Debbie Burse, the custodian, refused to clean
17 Plaintiff's work area or empty her trash can. See Njenga Decl. ¶ 48. Plaintiff also stated that Burse
18 failed to restock Plaintiff's work area with Kleenex and other items that she put on other co-
19 workers' desks. See Njenga Decl. ¶ 60. When Plaintiff confronted Burse, Burse made derogatory
20 statements based on Plaintiff's race. See id. ¶¶ 48-49. In the spring of 2004, an overgrowth of
21 mold, ivy and spiders completely covered one side of Plaintiff's work area because Burse refused to
22 clean it. See id. ¶ 50. Burse would aim her cleaning cart at Plaintiff and push it toward Plaintiff in a
23 menacing manner. See id. ¶ 51. Plaintiff reported these incidents to Pex in 2003-2004, but Pex took
24 no corrective action. See id. ¶ 53. Pex stated that she never directed Burse not to clean Plaintiff's
25 work area, and that she directed Burse to work harder to make sure that she did not leave any
26 impression that Burse was treating Plaintiff differently. See Pex. Decl. ¶ 6(a). Pex had no
27 knowledge of discriminatory remarks made by Burse or of whether Burse had any discriminatory
28 animus toward Plaintiff. See id. On December 2003, Pex helped to resolve the issues between

1 Burse and Plaintiff by having Burse write a letter of apology to Plaintiff. See id. Ex. B. On January
2 23, 2004, Plaintiff thanked Pex for her efforts in resolving the dispute between Plaintiff and Burse.
3 See id. Ex. C. Further, Reynoso Santa Cruz, the SMCOE Chief Negotiator/Senior Administrator for
4 Personnel, investigated Plaintiff's claims in the fall 2003 that her work area was tampered with and
5 that Burse had refused to clean it. See Santa Cruz Decl. ¶ 3. He did not find any specific employee
6 at fault and was unable to determine that the incidents were due to race or national origin
7 discrimination. See id. ¶ 3.

8 Plaintiff stated that she was only taken seriously by two black managers, Cecil Reeves,
9 SMCOE's Personnel Director, and Princess Tucker-Jones, Assistant Education Services Manager
10 for Secondary Services Division. See Njenga Decl. ¶ 65. Reeves investigated Plaintiff's concerns
11 about racism in 2001, and he recommended some cultural sensitivity training for the staff. See id. ¶
12 66; see also Pex Decl. ¶ 6(c). Pex stated that Reeves did not find any evidence of discrimination or
13 harassment of Plaintiff, but concluded that Plaintiff's aggressive conduct toward her fellow
14 employees was behind many of her work disputes. See Pex Decl. ¶ 6(b). Plaintiff also stated that
15 Reeves conducted a lecture on civility, but that he was met with anger from the staff. See Njenga
16 Decl. ¶¶ 68-70.

17 During the time that Pex was Plaintiff's supervisor, from the 2003-2004 school year and
18 again from fall 2006 through Plaintiff's medical leave in February 2007, Plaintiff had difficulties
19 obtaining office supplies because she had to go through the extra step of having her requests
20 approved by Harriet Beck, another Vocational Education Specialist. See Njenga Decl. ¶¶ 55-56.
21 Pex stated that she never refused any request from Plaintiff for office supplies, nor did she require
22 any preapproval process for Plaintiff that was different from any other employee. See Pex Decl. ¶
23 6(c). Plaintiff stated that she also had difficulty getting work equipment, such as a chair to replace a
24 broken one that had a metal pole sticking out of it. See Njenga Decl. ¶¶ 57-59. Plaintiff could not
25 get Burse to fix the chair and then Plaintiff fell off of it. See id. ¶ 59. Pex stated that she never
26 knowingly made Plaintiff use a broken chair. See Pex Decl. ¶ 6(c).

27 Plaintiff also stated that her work area was tampered with and trashed on numerous
28 occasions, and that it was not uncommon for her to find personal items, including her African

1 artifacts, removed from her desk or scattered on the floor. See Njenga Decl. ¶ 64. This occurred
2 consistently, with the worst times being in the fall of 2003, early 2004 and the fall of 2006. See id.

3 In October 2003, Plaintiff sent a memo to Joan Thomas, Pex and Tucker-Jones requesting
4 assistance in what Plaintiff believed was a hostile work environment. See Njenga Decl. ¶ 73;
5 Tucker-Jones Decl. ¶ 21. A meeting with Tucker-Jones, Pex, Plaintiff and her union representative,
6 Moberg, occurred on November 19, 2003. See id. ¶ 74; Moberg Decl. ¶¶ 6, 7; Tucker-Jones Decl. ¶
7 23. Plaintiff stated that Tucker-Jones concluded that Pex was treating Plaintiff differently, and that
8 Pex did not respond to this conclusion at all. See Njenga Decl. ¶ 74; Tucker-Jones Decl. ¶¶ 30, 31.

9 Plaintiff believed that Tucker-Jones called meetings, reprimanded Pex, reassured Plaintiff,
10 and conducted an investigation. See Njenga Decl. ¶ 76. Tucker-Jones assigned two Assistant
11 Managers to attend the Vocational Education Specialist meetings to protect Plaintiff from the
12 hostility of co-workers. See id. ¶ 77. Tucker-Jones completed a written investigation in December
13 2003 in which she found, among other things, that Pex denied Plaintiff the opportunity to work the
14 extended school year, that Pex had knowledge of Plaintiff's complaints about cleanliness but did not
15 act on them, that Pex did not give Plaintiff the opportunity for geographically convenient and
16 balanced caseloads, that Plaintiff was excluded from meetings and that when Plaintiff spoke at
17 meetings, her opinions were not considered. See Tucker-Jones Decl. ¶ 35.

18 Plaintiff also stated that during 2003-2004 and 2006-2007, Pex routinely made derogatory
19 comments about black people, referring to them as "those people," and to black communities as
20 "those places." See Njenga Decl. ¶ 96. However, at Plaintiff's deposition, she provided testimony
21 of only two instances when Pex made comments that Plaintiff believed were derogatory -- a
22 reference to Plaintiff's ex-husband being white and statements made at a dinner event when waitstaff
23 began talking to Plaintiff. See Shupe Decl. Ex. C at 97; 158; 176-78; 474-81. Pex denies making
24 any derogatory statements regarding Plaintiff's race or national origin. See Pex Decl. ¶ 6(h).

25 Plaintiff also stated that Pex unilaterally changed a form on which Plaintiff had self-
26 identified as "African," to identification as an "African-American." See Njenga Decl. ¶ 98. Pex,
27 however, denied changing any form. See Pex Decl. ¶ 6(h).

28 In May 2004, Plaintiff became ill because of the hostility in her office. See Njenga Decl. ¶

1 82. Plaintiff also stated that she observed her co-workers plotting against Tucker-Jones. See id.
2 Plaintiff stated that she heard co-workers making negative comments under their breath at
3 presentations by Tucker-Jones. See id. ¶ 83. Plaintiff was on leave until June 2004. See id. ¶ 86.

4 Plaintiff filed an EEOC charge in May 2004. See id. ¶ 87; Ex. B; Santa Cruz Decl. ¶ 4; Ex.
5 A. Santa Cruz was responsible for conducting an investigation into the charge. See Santa Cruz
6 Decl. ¶ 4. His investigation did not reveal any specific employee who had racially harassed or
7 discriminated against Plaintiff, but he reached the conclusion that the employees in the WorkAbility
8 unit had trouble relating to each other professionally and he encouraged the manager to address that
9 issue. See id. ¶ 4. After completing this investigation, Santa Cruz does not remember hearing any
10 other or further complaints from Plaintiff while he was employed there until he left in January 1,
11 2007. See id. ¶ 5.

12 When Plaintiff returned to work in the fall of 2004, Pex was no longer her supervisor, but
13 Plaintiff stated that Pex came by the office to make negative comments about Tucker-Jones. See
14 Njenga Decl. ¶ 89. Pex stated that from July 2004 through the fall of 2006, she had no interactions
15 or involvement with Plaintiff at all. See Pex Decl. ¶ 5.

16 In the Spring of 2005, Tucker-Jones intervened so that Plaintiff could attend a professional
17 development conference. See id. ¶ 78; Tucker-Jones Decl. ¶ 47. Pex stated that she never excluded
18 Plaintiff from attending any professional conferences. See Pex Decl. ¶ 6(i). Tucker-Jones also put a
19 new work order procedure in place so that Plaintiff's orders would get filled. See Njenga Decl. ¶ 78;
20 Tucker-Jones Decl. ¶¶ 43-46.

21 Tucker-Jones left SMCOE in summer 2006. See Njenga Decl. ¶ 91. Although Plaintiff
22 believes her departure was due to racial hostility, Tucker-Jones testified that she resigned because
23 she wanted to leave the large county office to work in a local school district. See Shupe Decl. Ex. D
24 at 15. Tucker-Jones, however, stated that she experienced discrimination while she was employed at
25 SMCOE, and that she suggested sensitivity training for the office. See Tucker-Jones Decl. ¶¶ 51-60.

26
27 Plaintiff stated that Pex refused to promote Plaintiff in the fall of 2006. See Njenga Decl. ¶
28 93. Pex had announced to the Vocational Education Specialists that she would be replacing the

1 Head Vocational Education Specialist and interested persons should leave a voicemail for Pex about
2 their interest. See id. Plaintiff promptly informed Pex that she was interested, but Plaintiff did not
3 get an application or an interview. See id. Pex told Plaintiff that she did not get the position, which
4 had been filled by Harriet Beck, a white female with less experience. See id. ¶¶ 93-94. Plaintiff
5 called her union representative. See id. ¶ 95; Moberg Decl. ¶ 8. Pex denied that her decision to
6 promote Beck was motivated by race or nationality, and stated that she just chose the best person for
7 the job. See Pex Decl. ¶ 6(j).

8 Plaintiff described a conference in Carmel in fall 2006 where Plaintiff was talking about her
9 ancestry with waiters at a dinner. See Njenga Decl. ¶¶ 100-102. Plaintiff stated that Pex made
10 negative comments about Plaintiff's discussions about her culture, and rolled her eyes. See id. ¶
11 103.

12 Plaintiff also stated that in January 2007, Pex took some of the staff to choose new furniture,
13 but would not let Plaintiff choose until after everyone else was finished, and by then, all of
14 Plaintiff's choices had been taken. See Njenga Decl. ¶ 61. Plaintiff also stated that Pex would not
15 allow Plaintiff to use her student project stipend. See id. ¶ 63.

16 By late February 2007, Plaintiff was exhausted from the hostility at her workplace, was
17 having severe hip pain and was contemplating hip replacement surgery. See Njenga Decl. ¶ 106.
18 On February 12, 2007, Plaintiff's doctor wrote a note to Plaintiff's employer stating that the surgery
19 was scheduled for March 29, 2007. See id. ¶ 107. Plaintiff stated that she gave the note to one of
20 the WorkAbility secretaries a few days after February 12, 2007 (see id. ¶ 107), but she had no
21 explanation in her earlier deposition for why the note was time-stamped March 8, 2007. See Shupe
22 Decl. Ex. C at 244-45. Plaintiff stated that she needed some time off to evaluate whether to have the
23 surgery. See Njenga Decl. ¶ 110. Plaintiff stated that Harriet Beck, the Head Vocational Education
24 Specialist, suggested that Plaintiff work from home and Plaintiff said that she would develop a
25 detailed plan to account for her five day absence, and that her training assistant Stephanie Luchessi,
26 would sign her out. See id. ¶¶ 111-12. Plaintiff stated that she discussed this with Luchessi and told
27 the teachers at her school sites that she would be absent. See id. ¶¶ 112-13. Plaintiff took time off
28 as planned, and spent the time evaluating her surgery options. See id. ¶ 115.

1 Meanwhile, on March 5, 2007, when Plaintiff did not attend a regularly scheduled
2 WorkAbility/Vocational Education staff meeting, Pex became worried about Plaintiff because
3 several Specialists stated that they had not seen or heard from Plaintiff in weeks, and because Pex
4 did not recall seeing her during that time period either. See Pex Decl. ¶ 7. Pex tried to contact
5 Plaintiff on her cell and home phones on March 5, 2007, leaving messages. See id. She also
6 contacted Mike Aaronian in the human resources department to see if he knew whether Plaintiff was
7 on leave. See id. Aaronian had no such information. See id. Pex was concerned, so she contacted
8 Laurie Mouton, a County Superintendent employee who works in payroll, to see if she had any
9 communication from Plaintiff. See id. Mouton had not. See id. She became even more concerned
10 and so spoke with the senior administrator, Carol Harriman, about it. See id. Harriman had also not
11 heard from Plaintiff in weeks. See id. Pex did not participate in any further efforts to ascertain
12 Plaintiff's whereabouts. See id.; Harriman Decl. ¶ 3.

13 Harriman was also concerned, so she talked with Aaronian about the options, one of which
14 was to call the local police department and have them do a welfare check. See Harriman Decl. ¶ 3.
15 Harriman decided that this was a good option, and instructed Aaronian to do so. See id. She did not
16 tell Aaronian or the police to break down Plaintiff's door. See id. Aaronian called the police on or
17 about March 7, 2007. See id.; see also Bosley Decl. ¶ 3. At around 8:00 p.m. on the same day that
18 Aaronian called the police, Harriman received a call from Plaintiff, and Harriman informed Plaintiff
19 that they had been so worried that they had called the police. See Harriman Decl. ¶ 4. Harriman's
20 actions were not motivated by race or retaliation. See id. Pex also received a return call from
21 Plaintiff on March 8, 2007, during which Pex explained that Plaintiff needed to call in when she was
22 going to be absent. See Pex Decl. ¶ 8.

23 The police broke down Plaintiff's door on or about March 6, 2007. See Njenga Decl. ¶ 116.
24 Plaintiff blames Pex for not contacting other people who might have known where she was instead
25 of escalating the matter to the police. See Njenga Decl. ¶ 125. Plaintiff claims that Pex should have
26 asked Luchessi or Beck about Plaintiff's whereabouts. See id. Further, Jacque Taliaferro, another
27 teacher, conducted her own investigation that revealed that Pex did not talk to several people who
28 might have known where Plaintiff was during this time. See Taliaferro Decl. ¶¶ 18-20; Moberg

Decl. ¶ 10.

Taliaferro, who is an African-American woman, also stated that she had difficulties with Pex. In 1994, Pex reprimanded Taliaferro for bringing her grandchild to work because the babysitter fell through. See Taliaferro Decl. ¶¶ 5-8. In 2003, Pex reprimanded Taliaferro for trying to get the attention of an Instructional Aide who was improperly sharing information about a student with her parents. See id. ¶¶ 11-13. In the fall of 2003, Pex made two attempts to get Taliaferro out of a meeting with Tucker-Jones to attend another meeting with Pex. See Taliaferro Decl. ¶¶ 17-18.

On or about March 8, 2007, Pex reprimanded Plaintiff for false entries in her time sheet based on Plaintiff working from home, which was not allowed. See Njenga Decl. ¶ 127. Plaintiff states that Pex told her to change her time sheets for the days in March when she was working from home because working from home is forbidden. See Njenga Decl. ¶ 127. Plaintiff stated that other white employees were allowed to work from home. See id. ¶ 128. Plaintiff changed her time sheets. See id. ¶ 130. Elsewhere, Plaintiff stated that she was not reprimanded for anything other than another incident involving employee Lisa Suruki. See Shupe Decl. Ex. C at 182-83. Further, Defendant Bosley, who became the Associate Superintendent for Human Resources at SMCOE in April 2007, states that a review of Plaintiff's personnel file reveals that there was only one reprimand, which had to do with Suruki. See Bosley Decl. ¶ 6.

On March 20, 2007, Plaintiff filed a grievance alleging an unsafe work environment stemming from the filing of the false missing person's report. See Njenga Decl. ¶ 131; Moberg Decl. ¶ 9. Pex investigated this complaint, but stated that she did not receive an answer from Plaintiff as to how a police welfare check at home could be an unsafe work condition as cited in the grievance. See Pex Decl. ¶ 9. Pex denied the grievance, and stated that she was not motivated by race or national origin or gender. See id. ¶ 9; Ex. D; Moberg Decl. ¶ 13. Pex noted that at no time from the fall of 2006 through March 2007 did Plaintiff complain to Pex that she felt discriminated against or retaliated against. See Pex Decl. ¶ 10. Plaintiff had hip surgery on March 29, 2007. See Njenga Decl. ¶ 132.

On June 7, 2007, Plaintiff attended a Level 2 grievance meeting with Bosley, Moberg and Taliaferro, relating to Plaintiff's complaint about the police welfare check. See id. ¶ 133; Moberg

Decl. ¶ 15. This was Bosley's first contact with Plaintiff. See Bosley Decl. ¶ 4. Plaintiff was upset by Bosley's disrespectful conduct at the hearing. See Njenga Decl. ¶ 134. Plaintiff stated that during this time, she received harassing phone calls from Bosley in June 2007, who defied Plaintiff's doctor's orders not to contact Plaintiff. See id. ¶¶ 135, 136. Although Bosley admits calling Plaintiff in June 2007 regarding another matter, the doctor's note prohibiting contact with Plaintiff was not written until August 2007. See Bosley Decl. Ex. E. Bosley denied Plaintiff's grievance, which she found to have nothing to do with Plaintiff's race or national origin or prior complaints. See Bosley Decl. ¶ 4; Ex. A. Plaintiff's union representative, Moberg, stated that he received a reprimand from Bosley based on his conduct in the office immediately following the level 2 grievance meeting, which he grieved and about which he eventually filed a lawsuit. See Moberg Decl. ¶¶ 16-20.

Plaintiff filed a level 3 grievance based on Bosley's denial at level 2. See Bosley Decl. ¶ 4; Holbrook Decl. ¶ 3; Moberg Decl. ¶ 21. On June 20, 2007, Holbrook, the County Superintendent, asked Plaintiff if she wanted to meet with Holbrook to discuss the level 3 grievance. See Holbrook Decl. ¶ 3. Plaintiff requested a one-on-one meeting. See id. Holbrook scheduled the meeting for June 28, 2007, which Plaintiff cancelled on June 25, 2007, and then changed her mind again. See id. Plaintiff and her union representative met with Holbrook, who asked Plaintiff to explain the basis for her grievance, which she was not able to do to Holbrook's satisfaction. See id. Plaintiff agreed to provide further information, so the parties agreed to postpone the strict dates for the grievance procedure. See id. On July 7, 2007, Plaintiff submitted further information, and on July 13, 2007, Holbrook denied the grievance because it did not set forth a basis under the collective bargaining agreement. See id. ¶ 3; Ex. A. Holbrook stated that she was not motivated by race or national origin or Plaintiff's past complaints and that the first time Holbrook had ever interacted with Plaintiff was when she filed the level 3 grievance. See id. ¶¶ 2-3. The first time that Holbrook learned of the earlier harassment and discrimination claims concerning events prior to June 2007 was when Plaintiff filed this lawsuit in 2008. See Holbrook Decl. ¶ 5. Plaintiff then filed a charge of unfair labor practices with the Public Employment Relations Board regarding the false police report, and PERB ultimately denied the grievance. See Holbrook Decl. ¶ 4.

1 On July 30, 2007, Bosley issued a written reprimand against Plaintiff regarding Plaintiff's
2 conduct toward her co-worker Lisa Suruki. See Njenga Decl. ¶ 137. Suruki held an administrative
3 position in the Student Services Division and the WorkAbility program. See Suruki Decl. ¶ 1.
4 Suruki states that one day when she was in the parking lot getting in her car to go to lunch, Plaintiff
5 ran up to her and physically prevented her from getting in her car, saying that Plaintiff had an urgent
6 matter to discuss, which turned out to be which background Plaintiff should choose for some
7 stationery. See Suruki Decl. ¶ 2. In 2006, Plaintiff began calling Suruki numerous times about a
8 requisition form from Plaintiff that Suruki had given to Pex. See Suruki Decl. ¶ 3. Suruki told
9 Plaintiff that there was nothing more she could do, but Plaintiff kept calling her, three times one day,
10 and four times in one day a few days later. See id. In the fall of 2006, Suruki began working in a
11 new building, but Plaintiff saw her running into work one day and started calling after her and
12 coming closer. See id. ¶ 4. Suruki was frightened and ran into her office. See id.

13 During the summer of 2007, Suruki found out that Plaintiff had written a letter about Suruki,
14 that had been left on the chair of another employee and then subsequently mailed to Suruki. See
15 Suruki Decl. ¶ 5; Ex. A; Bosley Decl. ¶ 6. Suruki found the letter to be nasty in tone and to accuse
16 Suruki of things that she did not do. See Suruki Decl. ¶ 5. Suruki met with Bosley and asked
17 Bosley what her options were, and Bosley told Suruki about the grievance process. See Suruki Decl.
18 ¶ 5; Bosley Decl. ¶ 6 (stating that it was part of her job to counsel employees about the complaint
19 process). Suruki had another meeting about the letter on June 11, 2007, in which she was told about
20 her right to file a formal grievance as well as a restraining order. See Suruki Decl. ¶ 6. Suruki states
21 that no one at SMCOE told her to file a complaint; she made up her own mind. See Suruki Decl. ¶
22 8. Suruki states that her sole reason for filing the complaint was to prevent Plaintiff from harassing
23 her and that she was not motivated by race. See id. On June 19, 2007, when Suruki received the
24 letter at her home, she decided to file a grievance. See id. ¶ 7; Ex. B.

25 Bosley telephoned Plaintiff to tell her that a complaint had been filed against her by Suruki.
26 See Bosley Decl. ¶ 6. Plaintiff hung up during that conversation. See id. Bosley followed up with a
27 letter on July 6, 2007. See id. ¶ 6; Ex. C. The certified letter was returned as unclaimed. See id.
28 Bosley sent another letter, but Plaintiff did not arrange to meet with her. See id. Bosley conducted

1 her investigation without Plaintiff's input and concluded that Plaintiff had been harassing Suruki.

2 See id.; Ex. D. Bosley issued a reprimand on July 30, 2007. See id.

3 Plaintiff stated that her physical and psychological condition precluded her from returning to
4 work in November 2007. See Njenga Decl. ¶ 138. Bosley stated that she notified Plaintiff in
5 October 2007 that her leave would be running out in November. See Bosley Decl. ¶ 8; Ex. F.
6 Bosley provided Plaintiff with the application form for unpaid leave. See id. Ex. G. Plaintiff filled
7 out the application, but did not put an ending date for her leave. See id. ¶ 8. On November 8, 2007,
8 Bosley denied Plaintiff's application for unpaid sick leave. See Njenga Decl. ¶ 139. Bosley
9 determined that she would not be able to find a qualified replacement for an indefinite term. See
10 Bosley Decl. ¶ 8; Ex. H. Bosley stated that Plaintiff was not terminated, but was placed on the
11 thirty-nine month rehire list, which gave her reemployment rights through February 8, 2010. See
12 Bosley Decl. ¶ 8. Bosley stated that other similarly situated white employees' requests for unpaid
13 leave have been denied. See id. Bosley was not motivated by race or national origin discrimination
14 or retaliation and she was not aware of any protected activity by Plaintiff until Plaintiff filed her
15 2008 EEOC charge. See id. ¶ 8. Bosley stated that she was not aware of Plaintiff's psychological
16 reason for not returning to work until this lawsuit was filed, and she assumed that the failure to
17 return to work was from Plaintiff's hip surgery. See Bosley Reply Decl. ¶ 3.

18 **Legal Standard**

19 Summary judgment shall be granted if "the pleadings, discovery and disclosure materials on
20 file, and any affidavits show that there is no genuine issue as to any material fact and that the
21 movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Material facts are those
22 which may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
23 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury
24 to return a verdict for the nonmoving party. Id. The court must view the facts in the light most
25 favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn
26 from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The
27 court must not weigh the evidence or determine the truth of the matter, but only determine whether
28 there is a genuine issue for trial. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Id. If the moving party meets its initial burden, the opposing party "may not rely merely on allegations or denials in its own pleading;" rather, it must set forth "specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e)(2); Anderson, 477 U.S. at 250. If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment as a matter of law." Celotex, 477 U.S. at 323.

Discussion

1. Summary judgment is granted as to Plaintiff's claims under 42 U.S.C. §§ 1981, 1983

Plaintiff alleged a violation of 42 U.S.C. § 1981 against all Defendants, and a violation of 42 U.S.C. § 1983 against the entity Defendant. These claims are precluded by the Eleventh Amendment. See Eaglesmith v. Ward, 73 F.3d 857, 859-60 (9th Cir. 1995); Pittman v. Oregon, 509 F.3d 1065, 1070-71 (9th Cir. 2007) (§ 1981 does not contain claim against states). Plaintiff concedes that the First Amended Complaint erroneously claims a violation of § 1983 against the entity Defendant and a violation of § 1981 against all Defendants, but seeks leave to amend the complaint.

Plaintiff argued in her supplemental brief that the Court should grant leave to correct this clerical error, and that Defendants will not suffer any prejudice if leave is granted. Specifically, Plaintiff argues that the issues pertaining to §§ 1981 and 1983 have been litigated since the beginning of this case, and that amendment of the complaint would benefit Defendants because claims against some Defendants would be removed. However, as Defendants argue in their supplemental brief, the benefit is negligible since the case has already proceeded through the expensive and time-consuming process of summary judgment.

1 Plaintiff also argues that Defendants could have asserted the qualified immunity defense, yet
2 chose not to, and in any event, that defense is not viable. As Defendants point out, however, the
3 qualified immunity analysis is more complex than simply finding that the broad right to be free from
4 employment discrimination is clearly established. In Saucier v. Katz, 533 U.S. 194, 201 (2001), the
5 Supreme Court mandated a two-step sequential process for resolving claims of qualified immunity.
6 First, courts consider the threshold question: “Taken in the light most favorable to the party asserting
7 the injury, do the facts alleged show the officer's conduct violated a constitutional right?” Saucier,
8 533 U.S. at 201 (“In the course of determining whether a constitutional right was violated on the
9 premises alleged, a court might find it necessary to set forth principles which will become the basis
10 for a holding that a right is clearly established.”). Second, “if a violation could be made out on a
11 favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was
12 clearly established.” Id. In Pearson v. Callahan, 129 S. Ct. 808, 818 (2009), the Court receded
13 from Saucier, holding “that the Saucier protocol should not be regarded as mandatory in all cases,”
14 but instead judges should exercise their sound discretion as to which of the two prongs of the
15 analysis to address first. Id. In Pearson, the Court determined that the officers in that case were
16 entitled to qualified immunity “on the ground that it was not clearly established at the time of the
17 search that their conduct was unconstitutional,” without first deciding whether the facts shown by
18 the plaintiff constituted a violation of a constitutional right. Id.

19 Although amendment is generally freely granted when justice requires under Federal Rule of
20 Civil Procedure 15, Plaintiff has not made a sufficient showing that justice requires amendment at
21 this late date after the deadline to amend the pleadings has passed, after discovery has closed, and
22 after this dispositive motion has been filed. Further, because this motion was filed on November 10,
23 2009, Plaintiff has known about this deficiency in her complaint since at least that time (and perhaps
24 earlier as described below), yet did not take steps to correct the alleged clerical error until filing her
25 opposition almost three months later on February 2, 2010. In fact, Defendants argue in their
26 supplemental brief that Plaintiff was on notice of the Eleventh Amendment issue as of the time of
27 the initial case management conference in November 2008 because the joint case management
28 conference listed the Eleventh Amendment immunity argument as a disputed legal issue.

Accordingly, Plaintiff's request to amend is untimely, and Defendants' motion for summary judgment on these two claims is granted.

2. The defense set forth in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998) is not applicable

In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998), the Supreme Court stated:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765; see also Nichols v. Azteca, 256 F.3d 864, 877 (9th Cir. 2001). Defendants argue that they are entitled to the Ellerth defense because at all times the County had a written discrimination and retaliation policy specifically intended to remedy harassing behavior (see Holbrook Decl. ¶ 7; Ex. B), and from 2005 through 2008, Plaintiff did not invoke that policy. Plaintiff, however, argues that the defense is not available because Plaintiff was terminated, and because Plaintiff repeatedly complained about harassment throughout the years.

The Court cannot state as a matter of law that Ellerth applies in this case. First, there is a dispute about whether Plaintiff was terminated. Second, although it appears that Plaintiff did not file any EEOC charges for several years after 2004, there is some evidence that she complained informally about harassment to her supervisors during that time, and they did not take reasonable care to prevent and promptly correct any harassment. See Tucker-Jones Decl. ¶ 38 (Plaintiff's complaints of discrimination and harassment "did not evaporate" after January 2004, and the

complaints continued: “It was very hard to make them [the complaints] go away. They seemed to grow different arms and other appendages as time went on up until I left [in 2006]”); ¶ 48(1) (“From June 2004 up until my departure in June 2006, [Plaintiff] reported to me that when she asked Debbie to clean her space, she responded with words to the effect that ‘you should know how to do it yourself.’”); ¶ 50 (“When I left, [Plaintiff] still had open grievances and concerns.”).

3. Events occurring prior to February 5, 2007 are not time-barred

To assert a claim under Title VII, a plaintiff must file an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the alleged unlawful employment action or within 300 days of the unlawful practice if the plaintiff files an administrative claim with a state agency first. See 42 U.S.C. § 2000e-5(e)(1); Josephs v. Pacific Bell, 443 F.3d 1050, 1061 (9th Cir. 2003). In order to assert a claim under the California FEHA, a plaintiff must file an administrative charge with the DFEH within one year of the alleged unlawful act. See Cal. Gov’t Code § 12960(d). Plaintiff filed her charge with the EEOC and the state Department of Fair Employment and Housing on February 5, 2008. See Shupe Decl. Ex. A. Therefore, Defendants argue that Plaintiff’s claims prior to February 5, 2007 are time-barred.

Defendants argue that there were only three events that occurred after February 5, 2007 that are included in the 2008 EEOC charge: (1) the police break-in to Plaintiff’s home on March 7, 2007; (2) the reprimand of Plaintiff in July 2007 for harassing Suruki; and (3) the refusal of Plaintiff’s open-ended request for leave in November 2007. Unless Plaintiff can satisfy the continuing violation doctrine for the FEHA, the events prior to February 5, 2007 are not actionable.

The California Supreme Court applied the continuing violation doctrine to a retaliatory course of conduct “for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period.” Yanowitz v. L’Oreal USA, 36 Cal. 4th 1028, 1056-58 (2005). Under California law, a continuing violation exists where the employer’s unlawful actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. See Richards v. CH2M Hill, Inc., 26 Cal. 4th 798, 823 (2001) (holding that when employer unlawfully refuses reasonable accommodation of disabled employee or engages in disability harassment, statute of limitations

1 begins to run either when course of conduct is brought to end or when employee is on notice that
2 further efforts to end unlawful conduct will be in vain); see also Valdez v. City of Los Angeles, 231
3 Cal. App. 3d 1043, 1052 (1991) (maintenance of discriminatory promotional system within one year
4 preceding appellant's filing his claim made the claim timely).

5 Defendants argue that Plaintiff cannot meet that standard because the actions that took place
6 within the limitations period were "classic personnel actions," yet the earlier misconduct did not
7 involve the same decision-makers and could not be characterized as personnel actions. However, at
8 least some of the pre-February 5, 2007 events involve the same decision-maker, specifically Pex.
9 Further, Defendants argue that there is no evidence of reasonable frequency because no complaints
10 were made between 2004 and 2007. Although there is no evidence that formal complaints were
11 made during that time, there is evidence that Plaintiff made informal complaints. See Tucker-Jones
12 Decl. ¶¶ 38, 48(1), 50. Defendants also argue that Defendants' alleged unlawful actions before
13 February 5, 2007 had achieved permanence because Plaintiff's 2004 EEOC charge had been
14 investigated and no further charges were filed until 2008.

15 Here, Plaintiff meets the Yanowitz/Richards test because the discriminatory and harassing
16 events before and after the limitations period were similar. In fact, Plaintiff testified that
17 discriminatory conduct, including job assignment inequities, unequal access to job resources,
18 shunning and humiliation, occurred on a daily basis. Plaintiff argues that the discrimination and
19 harassment all occurred within the same department with at least some of the same actors. Plaintiff
20 also argues that the lack of permanence prong is met because her 2004 EEOC charge did not signal
21 finality because she continued thereafter to work with her employer to remedy the problems she was
22 having.

23 Although this question is a close one, the Court concludes that there is sufficient evidence to
24 raise a triable issue of fact as to an actionable continuing violation. Further, even if the events could
25 not be part of a continuing violation, Plaintiff is not barred from using pre-limitations acts as
26 background evidence in support of her Title VII claim, even though she cannot seek damages for
27 those earlier incidents. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

28 **4. Defendants' motion for summary judgment as to Plaintiff's disparate treatment
discrimination claims is denied.**

1 Motions for summary judgment in employment discrimination actions are analyzed under the
2 burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
3 See, e.g., Chuang v. University of California Davis, 225 F.3d 1115, 1123-24 (9th Cir. 2000) (citing
4 McDonnell Douglas). A plaintiff alleging disparate treatment must first establish a triable issue of
5 fact as to a prima facie case of discrimination by showing: (1) she belongs to a protected class; (2)
6 she was qualified for the position; (3) she was subject to an adverse employment action; and (4)
7 similarly situated individuals outside her protected class were treated more favorably. See id. The
8 proof necessary for a plaintiff to establish a prima facie case is “minimal” and need not even rise to
9 the level of a preponderance of the evidence. See Reeves v. Sanderson Plumbing Prods., Inc., 530
10 U.S. 133, 143 (2000) (citing Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)). The
11 plaintiff need only offer evidence that “gives rise to an inference of unlawful discrimination,” arising
12 either under the McDonnell Douglas presumption or by more direct evidence of discriminatory
13 intent. Wallis, 26 F.3d at 889.

14 Once a plaintiff has sufficiently shown a prima facie case of discrimination, the defendant is
15 entitled to come forward with a legitimate, nondiscriminatory reason for the adverse employment
16 action. See Reeves, 530 U.S. at 142 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S.
17 248, 254 (1981)). The defendant's burden at this stage is one of production, not persuasion. The
18 court may not make a credibility assessment. See Reeves, 530 U.S. at 142 (citing St. Mary's Honor
19 Ctr. v. Hicks, 509 U.S. 502, 509 (1993)).

20 If the defendant offers admissible evidence of a legitimate, nondiscriminatory reason for the
21 claimed adverse action, the McDonnell Douglas framework and its presumption of discrimination
22 disappears, and the plaintiff is left to prove by a preponderance of the evidence that the reasons
23 offered by the defendant are merely a pretext for discrimination. See Reeves, 530 U.S. at 143
24 (citations omitted); Chuang, 225 F.3d at 1124 (the plaintiff must show that the articulated reason is
25 pretextual, “either directly by persuading a discriminatory reason more likely motivated the
26 employer or indirectly by showing that the employer's proffered explanation is unworthy of
27 credence.”) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
28 The ultimate burden of persuading the trier of fact that the employer intentionally discriminated

remains at all times with the plaintiff. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citing Burdine, 450 U.S. at 253).

Here, Defendants do not challenge Plaintiff's prima facie case. Instead they argue that they have met their burden of showing undisputed legitimate non-discriminatory reasons for their actions, and that Plaintiff has not raised a triable issue of pretext.¹

Legitimate, non-discriminatory reasons

Defendants have met their burden of offering evidence of legitimate non-discriminatory reasons for their conduct. First, with respect to the police welfare check, Pex testified that the extent of her involvement was to call a few people to try and find out where Plaintiff was, and then to express her concerns to Harriman, who subsequently made the decision to call the police in consultation with Aaronian but independent of Pex. There is no evidence that Pex suggested contacting the police. And there is no evidence that Harriman or Aaronian considered any illegal factor in making the decision to call the police. Plaintiff has cited no requirement that Pex search out any employee who might know of Plaintiff's whereabouts during an undisclosed absence. Plaintiff argued in her supplemental brief that she gave advance notice to Harriet Beck, which was the authorized procedure. See Supp. Memo in Opp. to Mot. for Summ. J. at 4. She also argued that she need not notify her immediate supervisor when taking a five-day absence. Id. Plaintiff's argument, however, is overstated. Plaintiff's declaration states only that she notified Harriet Beck of her absence, but is silent on the appropriate procedure to notify her employer of her absence. See

¹ Defendants argue that Plaintiff has offered no evidence of gender-based discrimination or harassment, so summary judgment should be granted as to her gender discrimination claim even if it is denied as to race and national origin discrimination. However, the Ninth Circuit has cautioned against isolating Plaintiff's gender discrimination claim from her race and national origin discrimination claims on summary judgment, particularly because Plaintiff has alleged discrimination based on color, race, national origin, and gender, *or a combination of those factors* (see First Am. Compl. ¶ 36). See Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994) ("At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences. . . . Accordingly, we agree with the Jefferies court that, when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.") (internal citations omitted). Accordingly, the Court does not grant summary judgment on Plaintiff's gender discrimination claim on this basis.

1 Njenga Decl. ¶¶ 108-113. Moreover, Plaintiff's declaration states that she may be absent for five
 2 days from work without producing a doctor's note, not that she need not inform her immediate
 3 supervisor of her absence. See Njenga Decl. ¶ 114.

4 Second, with respect to the July 30, 2007 reprimand involving Suruki, Defendants have
 5 provided evidence that Plaintiff twice sent a "poison pen" letter to Suruki at work, and on the second
 6 occasion, Suruki decided on her own, after getting information from Bosley and others about her
 7 options, to file a complaint. See Suruki Decl. ¶¶ 5, 8; cf. Davis Decl. Ex. C at 83-84 ("Q: Ms.
 8 Suruki, it wasn't your idea in the first place to file the formal grievance, was it? [objection omitted]
 9 A: No. It was Jeannie Bosley."). As director of human resources, Bosley was required to and did
 10 investigate the complaint, and sought Plaintiff's input, but Plaintiff refused to meet with her.
 11 Thereafter, Bosley determined that Plaintiff had sent the letter to Suruki and reprimanded her for
 12 that. Bosley has stated that she acted without discriminatory intent.

13 Third, with respect to the November 8, 2007 denial of open-ended leave, Defendants have
 14 provided evidence that Bosley denied the leave due to the open-ended nature of the request. Further,
 15 she stated that she would have had difficulty in finding a competent replacement willing to work for
 16 an uncertain amount of time. Thus, Defendants have met their burden of offering undisputed
 17 evidence of legitimate, non-discriminatory reasons for their conduct.

18 **Pretext**

19 Plaintiff makes several different arguments to support a showing of pretext. Based on some
 20 of those arguments, the Court concludes that Plaintiff has shown a triable issue of fact as to pretext
 21 sufficient to defeat summary judgment. Although some of the evidence for pretext occurred outside
 22 the statute of limitations, those incidents may be used to establish motive and provide a context for
 23 Plaintiff's present allegations. See Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344
 24 F.3d 822, 832 (9th Cir. 2003).

25 Plaintiff argues generally that numerical evidence shows that SMCOE's employment
 26 hierarchy is "racialized" because over 90% of its employees are white, and Plaintiff was the only
 27 African in the Secondary Services Division and the only certificated personnel of African descent in
 28 the WorkAbility program. See McDonnell, 411 U.S. at 805 ("On the latter point, statistics as to

petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.”). Plaintiff argues that this “inexorable zero” raises a triable issue of fact as to whether Defendants had a discriminatory purpose. International Brotherhood of Teamsters v United States, 431 U.S. 324, 342 n. 23 (1977). Defendants argue that these statistics do not show a racialized employment hierarchy because Bosley was not hired until April 2007 and cannot be responsible for past employment practices. See Reply at n. 5 (noting that under the direction of Bosley and Holbrook, percentage of non-Caucasian employees has risen by 4.2%). However, Plaintiff is alleging a racially discriminatory environment over her entire employment, not just since Bosley was hired. Further, although Defendants provide evidence that the SMCOE employs 490 persons, of whom 219 are non-Caucasian, there is no showing with respect to how many of them are African or African-American employees. See Bosley Reply Decl. ¶ 2. While statistics alone might not be sufficient to establish a triable issue of fact as to pretext, Plaintiff also points to other evidence.

Plaintiff points to her own history of experiencing discrimination such as unequal work assignments, unequal access to job resources and unequal access to professional development opportunities. In addition, Tucker-Jones, an African-American female, testified as to how the WorkAbility division was “the most dysfunctional and most riddled with internal conflict, including race-based conflict.” Tucker-Jones Decl. ¶ 20.

Plaintiff also argues generally that a triable issue of fact as to pretext can be inferred from the racially offensive comments Plaintiff endured from 1998 through 2007. In particular, Pex was a decision-maker who is alleged to have made a comment which could be interpreted as being about Plaintiff’s interracial marriage. Although Pex denies having made the statement, there is a triable issue of fact on that point. Further, although there is no evidence that Pex actively participated in the decision to call the police, her actions led to Harriman instructing Aaronian to call them, arguably a foreseeable consequence.

In addition, Plaintiff generally argues that the existence of other acts of discrimination raises a triable issue of fact as to discrimination. Here, Plaintiff points to complaints by three black women

(Jacque Taliaferro, Lorrie Owens, and Plaintiff) and one Asian woman (Judy Chin) that they were victims of disparate treatment at SMCOE. See Davis Decl. Ex. A, B; see Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1995) (“Similarly, we recently held that evidence of an employer's sexual harassment of female employees other than the plaintiff and evidence of the employer's disparaging remarks about women in general were relevant to a discriminatory discharge claim which alleged that the plaintiff's discharge was motivated by the employer's general feeling of hostility towards women.”) (internal citation omitted).

With respect to the July 30, 2007 reprimand involving Suruki, Plaintiff argues that Bosley urged Suruki to file a complaint against Plaintiff. Specifically, Suruki testified that it was Bosley's idea in the first place that Suruki file a grievance. See Davis Decl. Ex. C at 83-84. Although this is consistent with Bosley's declaration that, pursuant to her job duties, she informed Suruki of her options and asked her if she wanted to file a complaint (see Bosley Decl. ¶ 6), Suruki also testified that in a second meeting, she was asked by either Bosley or Glenn Siegel (the Director of Classified Personnel) whether she wanted to file a temporary restraining order and was told that she should seriously consider it. See Davis Decl. Ex. C at 81-82; 85. Suruki stated in her declaration that the decision to file a complaint was hers alone (see Suruki Decl. ¶ 8), but at the same time the evidence is susceptible of the inference that Defendants gave Suruki the idea to do so and encouraged her to proceed. Viewing all the evidence in the light most favorable to Plaintiff, there is a triable issue of fact as to whether Defendants' conduct with respect to the reprimand was pretextual.

Plaintiff also argues that discriminatory intent can be inferred based on an email from a private investigator to County personnel stating that he could do surveillance on Plaintiff to catch her violating some work policy. See Davis Decl. Ex. E. This email, however, is inadmissible because it is protected by the attorney-client privilege and work product doctrine.²

² Defendants argue that this document was inadvertently produced during discovery, and that it is protected by attorney-client privilege and the work product doctrine. See Reply Shupe Decl. ¶ 2; Ex. A. Federal Rule of Evidence 502(b) governs the question of whether the disclosure of a privileged document constitutes a waiver of the privilege. Under that Rule, there is no waiver if the disclosure was inadvertent, the holder of the privilege took reasonable steps to prevent disclosure and the holder promptly took reasonable steps to rectify the error upon discovering it. Here, Defendants have met the requirements of Rule 502(b). Defendants have established through counsel's declaration that the disclosure was inadvertent and that Defendants took reasonable steps to prevent its disclosure in the first

With respect to the denial of open-ended leave, Plaintiff appears to argue that this action was a pretext for discrimination because Defendants terminated her when she was in a “fragile psychological condition.” Opp. at 11. Defendants have produced evidence showing that until Plaintiff filed this action, the only knowledge her employer had about the reason for her not returning to work was her hip surgery. See Bosley Reply Decl. ¶ 3. As described below, however, there is evidence from which a reasonable inference can be drawn that Bosley had information about Plaintiff’s history of raising complaints of discrimination and harassment a few months before she denied Plaintiff’s leave. Bosley states in her declaration that her first contact with Plaintiff was at the June 7, 2007 level 2 grievance meeting regarding the report to the police. See Bosley Decl. ¶ 4. Moberg, Plaintiff’s union representative, stated that at this meeting, he told Bosley that this was an old case, that Plaintiff had previously filed claims of discrimination, that she had been previously

place. See Declaration of John Shupe re: Inadvertent Disclosure ¶ 2 (describing document review and Bates-stamp process, and stating that documents were reviewed and segregated by counsel based on privilege and were placed in a folder entitled: “Njenga: Documents not to be produced.”). Defendants also took prompt and reasonable steps to rectify the error by sending a letter one week after it discovered the inadvertent disclosure when the exhibit was filed in Plaintiff’s opposition. Plaintiff argues, however, that the email is not protected by either the attorney-client privilege because it is not a communication between a lawyer and client, or the work product doctrine because it was not prepared in anticipation of litigation. However, the document is privileged because it was authored by a private investigator hired by the County Counsel’s office to provide suggestions on steps the County Superintendent might take with respect to Plaintiff because the County’s counsel viewed Plaintiff as threatening litigation. See Declaration of John Beiers ¶ 2; see also VISA U.S.A., Inc. v. First Data Corp., 2004 WL 1878209, at *4-5 (N.D. Cal. Aug. 23, 2004) (stating that “‘courts have extended the [attorney-client] privilege to the substantive advice and technical assistance’ of agents of the attorney.”) (internal citation omitted) (citing United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (finding that the attorney-client privilege applied to communications by a client to an accountant in the attorney’s office where the communications were incident to obtaining legal advice and where the presence of the accountant was “necessary, or at least highly useful. . .”). Further, the investigator’s report was treated as privileged because it was part of Mr. Beiers’ communication with his client and the investigator hired by counsel’s office. See id. With respect to the work product doctrine, Mr. Beiers stated that he viewed Plaintiff as threatening litigation arising from a grievance, which caused at least in part the County’s counsel to hire the investigator. See Beiers Decl. ¶ 2. Even though Plaintiff argues that Defendants could not have anticipated litigation in February 2007 when they hired the investigator, they have provided no evidence to support a finding that Defendants did not reasonably anticipate litigation. The work product protection extends to agents of an attorney. See Fed. R. Civ. P. 26(b)(3)(A); United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1087 (N.D. Cal. 2002). The Court concludes that the document, which is protected by the attorney-client privilege and the work product doctrine, was inadvertently produced and that, therefore, the privilege has not been waived.

1 subjected to discrimination and retaliation, and that the police report was retaliatory.³ See Moberg
2 Decl. ¶ 15. Further, there is evidence that Bosley examined Plaintiff's personnel file on June 11,
3 2007 (see Davis Decl. Ex. M) and that such prior complaints are regularly kept in personnel files
4 (see Tucker-Jones Decl. ¶ 61).

5 Further, Plaintiff argues that even if the exhaustion of sick leave were a legitimate factor in
6 terminating Plaintiff, "this does not purge the taint of illegitimate factors arising out of years of
7 workplace harassment." See Opp. at 14. As Defendants point out, Bosley, who made the
8 termination decision, did not have a lengthy history with Plaintiff as Bosley was only hired in April
9 2007, after Plaintiff left her employment to go on extended sick leave, and states that she did not
10 terminate Plaintiff because of her race or national origin. See Bosley Decl. ¶ 9. On the other hand,
11 Plaintiff alleges a lengthy history of harassment and discrimination involving at least one decision-
12 maker, Pex, and a reasonable inference can be drawn that Bosley knew of this history because she
13 examined Plaintiff's personnel file and there is evidence that Moberg told her of the history of
14 Plaintiff's employment complaints. Accordingly, there is at least a triable issue of fact as to whether
15 Bosley's denial of Plaintiff's leave was pretextual.

16 Plaintiff also points to a handwritten draft of a letter dated March 22, 2007 giving Plaintiff
17 notification of the intent to determine Plaintiff's future with SMCOE. See Davis Decl. Ex. F. But
18 this draft letter, which appears to have contemplated formal action against Plaintiff based on her
19 falsification of time cards, does not raise a triable issue of fact that the reprimand for the Suruki
20 letter was a pretext for discrimination. As Defendants point out, Plaintiff has not argued that
21 falsification of time records would not warrant discipline and, in fact, Plaintiff was not disciplined
22 for it. See Reply at n.3.

23 Plaintiff also argues that Bosley's reason for termination was pretextual because Defendants'
24 documents show that almost 70% of the individuals terminated at SMCOE due to paid sick leave
25 exhaustion are people of color, and people of color are only 10% of the general Secondary Services
26

27
28 ³ Defendants object to paragraph 15 as inadmissible hearsay. However, paragraph 15 is not
hearsay as to whether Moberg made the statements, thus putting Bosley on notice, but only as to
whether the statements are true in substance.

1 employee population. Opp. at 11, 15.⁴ Defendants argue persuasively, however, that this evidence
2 is not probative of discrimination. Plaintiff has presented no evidence showing that extended leave
3 requests from white employees are treated more favorably, which would be a relevant statistic.

4 On balance, examining the evidence in the light most favorable to Plaintiff, she has raised a
5 triable issue of fact as to whether Defendants' legitimate, non-discriminatory reasons were a pretext
6 for discrimination. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's
7 discrimination claim is denied.

8 **5. Defendants' motion for summary judgment of Plaintiff's hostile work environment**
9 **claim is denied**

10 To assert a Title VII claim based on a hostile work environment, a claimant must allege a
11 "pattern of ongoing and persistent harassment severe enough to alter the conditions of employment."
12 Burrell v. Star Nursery, Inc., 170 F.3d 951, 954 (9th Cir. 1999). California courts look to federal
13 law on Title VII discrimination claims to interpret analogous provisions of FEHA. Mixon v. Fair
14 Employment and Housing Comm'n., 192 Cal. App. 3d 1306, 1316-17 (1987). "In order to prevail on
15 her hostile work environment claim, [plaintiff] must show that her 'workplace [was] permeated with
16 discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of
17 [her] employment and create an abusive working environment.' The working environment must
18 both subjectively and objectively be perceived as abusive." Brooks v. City of San Mateo, 229 F.3d
19 917, 924 (9th Cir. 2000) (citations omitted); see also Fuller v. City of Oakland, 47 F.3d 1522, 1527
20 (9th Cir. 1995); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1113 (9th Cir. 2004) ("Simply
21 causing an employee offense based on an isolated comment is not sufficient to create actionable
22 harassment under Title VII. However, the harassment need not cause diagnosed psychological
23 injury. It is enough 'if such hostile conduct pollutes the victim's workplace, making it more difficult
24 for her to do her job, to take pride in her work, and to desire to stay on in her position.'") (internal
25 citations omitted).

26 ⁴ In connection with Plaintiff's statistics, Plaintiff asks the Court to take judicial notice
27 of Census Bureau data for 2005-2007 showing that the general population of the County was 62.8%
28 white, whereas the Secondary Services Division is 91% white. See Tucker-Jones Decl. ¶ 10. The Court
takes judicial notice of this data, but it has little probative value because it does not show what
percentage of the general population are qualified to work in the Secondary Services Division, among
other things.

1 The Ninth Circuit uses a “totality of the circumstances test to determine whether a plaintiff’s
2 allegations make out a colorable claim of hostile work environment,” considering factors such as
3 “frequency, severity and level of interference with work performance.” Brooks, 229 F.3d at 924.
4 “When assessing the objective portion of a plaintiff’s claim, [the court] assume[s] the perspective of
5 the reasonable victim.” Id. (citations omitted); McGinest, 360 F.3d at 1115 (“We now state
6 explicitly what was clear from our holding in Ellison, that allegations of a racially hostile workplace
7 must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group
8 of the plaintiff.”). Further, “[i]n evaluating the objective hostility of a work environment, the factors
9 to be considered include the ‘frequency of discriminatory conduct; its severity; whether it is
10 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably
11 interferes with an employee’s work performance.’” McGinest, 360 F.3d at 1113.

12 In determining what constitutes sufficiently pervasive harassment, courts have held that acts
13 of harassment cannot be occasional, isolated, sporadic, or trivial. Rather, the plaintiff must show a
14 concerted pattern of harassment of a repeated, routine or a generalized nature. See Fisher v. San
15 Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989) (stating that while an employee “need not
16 prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment
17 requires a commensurately higher showing that the sexually harassing conduct was pervasive and
18 destructive of the working environment.”).

19 Plaintiff argues that she has made the objective and subjective showing required to survive
20 summary judgment. Specifically, Plaintiff points to an eight-year pattern of harassment, including
21 being shunned and ostracized, disrespected during meetings and daily interactions, asked about
22 black magic and her tribal body art, deprived of equal professional development opportunities,
23 subjected to heightened scrutiny, falsely reported as dead to the police, and terminated. Further,
24 Plaintiff notes that she observed that Defendants harassed Tucker-Jones, a female African-
25 American. Plaintiff testifies that she believes that all of the conduct she described was racially
26 motivated, which creates a triable issue of fact as to the subjective prong of the test. Objectively, the
27 evidence presented by Plaintiff creates a triable issue of fact as to a hostile work environment.
28 There is evidence that from the perspective of a reasonable African woman, the events at SMCOE

1 were frequent, almost daily, and in some cases were physically threatening. Plaintiff has raised a
2 triable issue of fact as to whether the harassment unreasonably interfered with her work because, for
3 example, she was assigned to schools on opposite ends of the County and was denied equal access to
4 work supplies and equipment and a clean workplace. Viewing the evidence in the light most
5 favorable to Plaintiff, a reasonable jury could find that Plaintiff was subjected to a hostile work
6 environment. Therefore, summary judgment as to Plaintiff's hostile work environment claim is
7 denied.

8 **6. Defendants' motion for summary judgment of Plaintiff's retaliation claim is denied.**

9 The elements of a prima facie retaliation claim are that: (1) plaintiff undertook a protected
10 activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link
11 exists between the two events. See Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir.
12 2004) (Title VII); Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005) (FEHA).
13 Causation "may be inferred from circumstantial evidence, such as the employer's knowledge that the
14 plaintiff engaged in protected activities and the proximity in time between the protected action and
15 the allegedly retaliatory employment decision." Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir.
16 1987); see also Flait v. No. American Watch Corp., 3 Cal. App.4th 467, 478 (1992) (reversing
17 judgment for employer on motion for summary adjudication where circumstantial evidence of causal
18 link raised issue of fact). To show a causal connection, a plaintiff "must make some showing
19 sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had
20 engaged in protected activity." Raad v. Fairbanks N. Star Borough School Dist., 323 F.3d 1185,
21 1197 (9th Cir. 2003).

22 Once a plaintiff produces evidence supporting a prima facie case, the burden shifts to the
23 defendant employer to articulate a legitimate, non-retaliatory reason for the adverse employment
24 action. Once the employer articulates such a reason, a plaintiff bears the burden of demonstrating
25 that the reason was merely a pretext for the unlawful retaliatory motive. See Stegall v. Citadel
26 Broad. Co., 350 F.3d 1061, 1066 (9th Cir. 2003); Yanowitz, 36 Cal. 4th at 1042. A plaintiff can
27 prove pretext with either direct or indirect evidence. If a plaintiff offers direct evidence of
28 discriminatory motive, a triable issue as to the actual motivation of the employer is created even if

the evidence is not substantial. When direct evidence is unavailable, however, and the plaintiff proffers only circumstantial evidence that the employer's motives were different from its stated motives, specific and substantial evidence of pretext is required to survive summary judgment. Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1066 (9th Cir. 2003) (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998)).⁵

Plaintiff argues that the harassment she experienced was in retaliation for her May 2004 EEOC complaint, and her earlier internal complaints of discrimination in the late 1990's, 2001 and 2003. Plaintiff bases her argument on Tucker-Jones' declaration that Plaintiff was retaliated against from January 2004 forward for having "negative attention brought to bear on the unit . . . She was isolated, ignored and ostracized."⁶ Tucker-Jones Decl. ¶ 39. "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." Bell v. Clackamas County, 341 F.3d 858, 865 (9th Cir. 2003) (citing cases); see also Winarto v. Toshiba, 274 F.3d 1276, 1285 (9th Cir. 2001). Therefore, it can be inferred from Tucker-Jones' testimony, as well as from Plaintiff's testimony, that she experienced harassment and discrimination on an ongoing basis, and that the temporal proximity between the protected activity and the harassment constituted retaliation. Further, Plaintiff argues that the acts of retaliation include the false police report in March 2007, the July 30, 2007 reprimand and the termination in November 2007. These events, however, are not in close temporal proximity with the 2004 EEOC complaint.

Defendants argue that Plaintiff has failed to make out the causal element of her prima facie case. Specifically, with respect to the police report, Defendants argue that Pex's involvement in the

⁵ As noted in Stegall, the Supreme Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), undermines Godwin to the extent that it implies that direct evidence is more probative than circumstantial evidence, but upholds Godwin to the extent that a plaintiff still needs to proffer specific and substantial evidence of pretext to overcome the summary judgment motion. Stegall, 350 F.3d at 1066; see also Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1031 (9th Cir. 2006) ("Although there may be some tension . . . on this point -- several of our cases decided after Costa repeat the Godwin requirement that a plaintiff's circumstantial evidence of pretext must be 'specific' and 'substantial'").

⁶ Defendants object to paragraph 39 of Tucker-Jones' declaration as improper legal conclusion. Tucker-Jones' conclusion that Plaintiff experienced retaliation is an improper legal conclusion, but the statements regarding Plaintiff's treatment are factual, not legal conclusions. Accordingly, Defendants' objection is overruled in part.

efforts to locate Plaintiff ended when she told Harriman that she was concerned about Plaintiff. However, a reasonable inference can be drawn that Pex's actions set in motion the chain of events that led to the police check of Plaintiff's home. Although Pex states that she did not know about Plaintiff's May 2004 EEOC complaint until after Plaintiff filed this lawsuit (see Pex Decl. ¶ 4), there is evidence that she knew of other complaints by Plaintiff, including the complaint about Burse, when those complaints occurred in 2003 and 2004, when Pex supervised Plaintiff. Pex also states that from the fall of 2006 through March 2007 when Plaintiff stopped coming to work, Plaintiff did not make any complaints of discrimination or retaliation or harassment. See Pex Decl. ¶ 10. However, there is evidence that Plaintiff made regular informal complaints. See Tucker-Jones Decl. ¶¶ 38, 48(1), 50. This is a close question, and it is perhaps doubtful that Plaintiff can prevail in her claim that the police welfare check was discriminatory or retaliatory. However, examining the evidence in the light most favorable to Plaintiff, there is a triable issue of fact as to whether Pex knew of the May 2004 EEOC complaint and retaliated against Plaintiff through her involvement with the call to the police.

With respect to the July 30, 2007 reprimand by Bosley regarding Suruki and Bosley's denial of open-ended leave in November 2007, Defendants argue that it is uncontroverted that Bosley, who just began her employment in April 2007 in a supervisory capacity over Plaintiff, had no knowledge of Plaintiff's prior complaints when she made these decisions. However, as described above, there is evidence that supports an inference that Bosley knew of Plaintiff's complaint history at least as of June 7, 2007. Viewing the evidence in the light most favorable to Plaintiff, there is a triable issue of fact as to Plaintiff's prima facie case for retaliation as to the reprimand and the denial of leave.

As described above, Defendants have shown a legitimate reason for the reprimand and the denial of leave, and Plaintiff has raised a triable issue of fact as to pretext. Therefore, Defendants' motion for summary judgment on Plaintiff's retaliation claim based on the July 2007 reprimand and the leave is denied.

7. Plaintiff's claim for failure to prevent discrimination survives.

Plaintiff has a claim against the County entity for failure to prevent discrimination and harassment under California Government Code § 12940(k), which states:

1 It shall be an unlawful employment practice, unless based upon a bona fide
2 occupational qualification, or, except where based upon applicable security
regulations established by the United States or the State of California:

3 ***

4 For an employer, labor organization, employment agency, apprenticeship training
5 program, or any training program leading to employment, to fail to take all
reasonable steps necessary to prevent discrimination and harassment from occurring.

6 See also Northrop Grumman Corp. v. Workers' Comp. Appeals Bd., 103 Cal.App.4th 1021, 1035
7 (2002) ("Moreover, employers must 'take all reasonable steps necessary to prevent discrimination
8 and harassment from occurring.'"). Plaintiff argues that Holbrook failed to take steps to end the
9 harassment of Plaintiff and so summary judgment should not be granted on this claim. Defendants
10 did not move for summary judgment on this claim, and they do not mention it in their reply brief. In
11 any event, because the Court concludes that there is a triable issue of fact as to discrimination, this
12 claim also survives summary judgment.

13 **Conclusion**

14 Accordingly, Defendants' motion for summary judgment is granted in part and denied in
15 part. The Court's ruling on the remaining evidentiary objections will be set forth in a separate
16 Order.

17 **IT IS SO ORDERED.**

18 Dated: March 30, 2010

Elizabeth D. Laporte

ELIZABETH D. LAPORTE
United States Magistrate Judge